Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation, TLM Logistics Inc. and JCE Logistics Inc.,

employers.

Board File: 26935-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation and Eazy Express Inc.,

employers.

Board File: 26936-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation and 1644307 Ontario Inc.,
operating as Super Express,

employers.

Board File: 27028-C

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation and
RMS Pope Incorporated,

employers.

Board File: 27029-C

Neutral Citation: 2012 CIRB 635
March 9, 2012

In the context of a series of applications filed by the Canadian Union of Postal Workers (CUPW) seeking declarations of single employer between Canada Post Corporation (CPC) and various companies performing services for CPC under contract (collectively, the mail contractors), CPC raised a preliminary issue regarding the applicability of section 13(5) of the *Canada Post Corporation Act*, R.S.C., 1985, c. C-10 (the *CPC Act*) to CUPW's applications. By agreement of the parties, the Canada Industrial Relations Board (the Board), composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Norman Rivard and Patrick Heinke, Members, dealt with the preliminary issue in a separate hearing, held on January 16, 2012. Following the hearing, the parties submitted written closing arguments. The Board issued a bottom-line decision on February 29, 2012. These are the Board's reasons for its decision regarding the preliminary issue.

Appearances

Messrs. Jean-Marc Eddie and Joël Dubois, for Canadian Union of Postal Workers;

Messrs. John D. R. Craig and Michael S. Smyth, for Canada Post Corporation;

Mr. Thomas A. Stefanik, for Eazy Express Inc. and RMS Pope Incorporated.

I–Background

[1] Section 13(5) of the *CPC Act* provides:

> (5) Notwithstanding any provision of Part I of the *Canada Labour Code*, for the purposes of the application of that Part to the Corporation and to officers and employees of the Corporation, a mail contractor is deemed not to be a dependent contractor or an employee within the meaning of those terms in subsection 3(1) of that Act.

[2] The term "mail contractor" is defined in section 2(1) the *CPC Act* as "...a person who has entered into a contract with the Corporation for the transmission of mail, which contract has not expired or been terminated."

[3] This provision was originally enacted as section 13(6) of the *CPC Act* when CPC was created in 1981 to replace the former Post Office Department. Prior to 1981, labour relations between the Post Office Department and its employees had been governed by the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35. One consequence of the transition from a government department to a Crown corporation was that labour relations at CPC became subject to the *Canada Labour Code*. At the time, Part V of the *Canada Labour Code* governed industrial relations; Part V was renumbered as Part I during the general statute revision of 1985.

[4] The Federal Court of Appeal (the Court) had occasion to consider section 13(6) (now section 13(5)) of the *CPC Act* in 1987, in the context of a judicial review of a decision of the Canada Labour Relations Board (CLRB) which had found that rural route couriers engaged by CPC were employees within the meaning of the *Code*. In *Canada Post Corp. v. C.U.P.W.*, [1989] 1 F.C. 176, the Court held that Parliament's intention in enacting section 13(6) was to define and limit the jurisdiction of

the Board, and that the standard of review for Board decisions interpreting that provision is one of correctness. The Court went on to say that the Board's undoubted power and jurisdiction to declare who is or is not an employee is circumscribed by this provision of the *CPC Act*. In the Court's view, Parliament intended that persons holding contracts for the transmission of mail are not to be treated as dependent contractors or employees, even if their contracts place them in a position of dependence.

[5] In the same decision, the Court pointed out that the expression "mail contractor" appears in only two provisions of the *CPC Act*: sections 13(6) and 38 (now sections 13(5) and 40 respectively). The latter provision provides mail contractors with the same immunity as the Crown and CPC from claims made by the public.

[6] CUPW's applications to have TLM Logistics Inc. and JCE Logistics Inc., Eazy Express Inc., Super Express and RMS Pope Incorporated declared to be single employers with CPC were brought under section 35 of the *Canada Labour Code* (*Part I–Industrial Relations*) (the *Code*), which provides as follows:

> 35. (1) Where, on application by an affected trade union or employer, associated or related federal works, undertakings or businesses are, in the opinion of the Board, operated by two or more employers having common control or direction, the Board may, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business. Before making such a declaration, the Board must give the affected employers and trade unions the opportunity to make representations.
>
> (2) The Board may, in making a declaration under subsection (1), determine whether the employees affected constitute one or more units appropriate for collective bargaining.

[7] It is not disputed that TLM Logistics Inc. and JCE Logistics Inc., Eazy Express Inc., Super Express and RMS Pope Incorporated are mail contractors within the meaning of the *CPC Act*.

II–Positions of the Parties

A–Canada Post Corporation

[8] CPC argues that section 13(5) acts as a complete bar to CUPW's applications.

[9] CPC submits that the legislative intent of section 13(5) of the *CPC Act* was to create a clear labour relations separation between CPC and mail contractors with respect to any and all provisions of the *Code*. It argues that section 13(5) prevents mail contractors and their workers from being treated as dependent contractors or employees of CPC for the purposes of *Part I* of the *Code*. It argues that this provision of the *CPC Act* means that mail contractors cannot be found to be a single employer with CPC and that any workers engaged by a mail contractor cannot be included within a bargaining unit of CPC employees. It suggests that the clear purpose of section 13(5) of the *CPC Act* would be undermined if the Board were to find that CPC and the mail contractors are a single employer for the purposes of the *Code*.

[10] CPC points out that, since the time that CUPW filed its section 35 applications, two of the mail contractors named in the applications, Eazy Express Inc. and Super Express, no longer hold the contracts that were the subject of two of the applications. This is consistent with CPC's contracting policies, which result in the regular retendering of the Combined Urban Service (CUS) and the Highway Services (HS) contracts.

[11] Through the evidence of its former National Director of Transportation Contracting, Mr. Allan McArthur, CPC informed the Board that CPC has some 200 commercial agreements with between 125 and 150 CUS contractors, and between 1000 and 1200 commercial agreements with some 600 to 800 HS contractors. According to Mr. McArthur, CPC and its predecessor Post Office Department, historically contracted out CUS and HS work, as this is a more economical and cost-effective business model and avoids the need for CPC to maintain a large fleet of vehicles. Tendering is through an open, competitive process. CPC evaluates the bids based on multiple factors, including price, ability to provide the required service, vehicles, references and previous work for CPC. CPC is not concerned whether the successful bidder is an individual, a sole proprietorship, a partnership or a corporation, its main concern is to obtain the most competitive price for services. Mr. McArthur testified that it is common for CUS and HS mail contractors to have or to engage their own workforces to perform services under their commercial agreement(s) with CPC. These workforces can range from a few workers or family members to large scale operations with employees, owner/operators, lease/operators or a combination of employees and subcontractors.

[12] CPC also presented the evidence of its former General Counsel, Mr. Peter McInenly, who was involved in the transformation of the Post Office Department into a Crown corporation in 1981. He testified that the concerns that motivated this change included financial viability, service standards and stable labour-management relations. Mr. McInenly's evidence was that cost effectiveness was the main reason for continuing the use of mail contractors engaged through a tendering process for the CUS and HS functions. His evidence was that the original version of section 13(5) of the *CPC Act*, then known as Bill C-42, was drafted broadly, and would have had the effect of excluding all mail contractors, including federally regulated employers such as Air Canada and Canadian National Railways, from the jurisdiction of the *Code*. In order to ensure that mail contractors remained subject to the *Code* for the purpose of their relations with their own employees, the provision was amended in Committee to simply deem mail contractors not to be dependent contractors.

[13] CPC argues that the fundamental objectives of section 13(5) of the *CPC Act* were:

> (1) to continue the labour relations status of the postal service and its mail contractors as they existed at the time of the enactment of the *CPC Act* in 1981, namely that mail contractors and their employees could not be included in a bargaining unit with CPC employees;
> (2) to ensure that CPC would be able to continue the pre-1981 tendering and contracting practices regarding mail contractors without fear of adverse labour relations consequences; and
> (3) to provide CPC and its trade unions with stability and certainty concerning who could and who could not have a labour relationship with CPC under the *Code*.

[14] CPC suggests that the record of the debates when Bill C-42 was considered by the Standing Committee on Miscellaneous Estimates on December 18, 1980, confirm this legislative intention to override the *Code* in order to preserve the tendering process that was then in place. It argues that the records of Parliamentary consideration of Bill C-42 support its contention that section 13(5) was intended to apply to mail contractors with their own workforces, and to create a labour

relations separation between those contractors and CPC. It points out that the Parliamentary record was considered by the Court in *Canada Post Corp.* v. *C.U.P.W.*, *supra*, when it confirmed that rural route contractors were not employees or dependent contractors for the purposes of the *Code*.

[15] CPC argues that the individual workers who perform services for a mail contractor under a commercial agreement with CPC, can be considered to be dependent contractors even if they are not signatories to the commercial agreement with CPC. It argues that, by operation of section 13(5) of the *CPC Act*, both the mail contractor that is signatory to a commercial contract with CPC and any workers performing services under that contract, must be deemed not to be employees or dependent contractors and therefore cannot belong to any CPC bargaining unit.

[16] CPC distinguishes the Board's decision in *Eazy Express Inc.*, 2010 CIRB LD 2277, in which the Board found that employees of a mail contractor were employees vis-à-vis that contractor and were entitled to seek union representation, as that case did not involve the application of section 35 of the *Code*. CPC also distinguishes the decision of a wage recovery referee, *A.P.W. Enterprises Ltd. v. Attridge*, [1988] C.L.A.D. No. 689 (B.D. Bruce) (QL), which observes that section 13(5) of the *CPC Act* applies only to persons who have entered into a contract with CPC, on the grounds that the decision was dealing with an issue under *Part III* of the *Code*, not *Part I*.

[17] CPC argues that, if mail contractors are not employees or dependent contractors, then the only remaining status they can have is that of independent contractor. CPC argues that, if the mail contractors are independent, they cannot be found to be a single employer with CPC, since the Board's discretion to declare employers to be a single employer for the purposes of the *Code* depends on a finding that the two be under common control or direction.

[18] CPC also argues that, in any event, the Board should not exercise its discretion to declare that the mail contractors named in the instant applications are a single employer with CPC, as such a declaration would have substantial deleterious effects on CPC and the mail contractors.

[19] CPC urges the Board to reject CUPW's position that the employees of mail contractors can be swept into CUPW's main bargaining unit through the operation of section 35 of the *Code* because

those employees have not formally entered into contracts directly with CPC. It argues that such a result is at odds with the legislative intention to maintain the pre-1981 separation of postal employees from mail contractors and their employees. It suggests that, if CUPW's position were to prevail, CPC would be vulnerable to being declared a single employer with potentially every mail contractor that has a workforce of its own. An inquiry would be required in each case, as some mail contractors have employees, but others engage owner/operators or lease/operators to perform the work.

B The mail contractors

[20] Only Eazy Express Inc. (Eazy) chose to participate in the Board's proceedings regarding the preliminary issue. It agrees with CPC that section 13(5) of the *CPC Act* prevents the Board from dealing with CUPW's application to declare it a single employer with CPC.

[21] Eazy points out that it is not disputed that it is a "mail contractor" within the meaning of the *CPC Act*. It relies on the evidence of CPC's witness, Mr. Allan McArthur, for the proposition that the relationship between CPC and its mail contractors is based on performance and reliability, and that the legal form of the mail contractor (i.e., whether individual, sole proprietorship, partnership or corporation) is of no relevance or concern to CPC. Like CPC, Eazy argues that the Board should interpret the definition of "mail contractor" in the *CPC Act* as encompassing not only the legal entity that contracts with CPC, but also all of the individuals performing services under that contract. To do otherwise, Eazy submits, would be to prefer form over substance and would serve no labour relations purpose.

[22] Eazy suggests that, if CUPW's interpretation were adopted, then different results would flow depending upon the corporate structure of the mail contractor. It argues that Parliament cannot have intended that the applicability of section 13(5) would depend on the nature and structure of the party with whom CPC contracts.

C. CUPW

[23] CUPW takes the position that, because the employees of the mail contractors have not themselves signed contracts with CPC, section 13(5) of the *CPC Act* does not prevent them from being found to be employees of CPC. It argues that, while the definition of "postal employee" in the former *Post Office Act* expressly excluded an "employee of a mail contractor", that language is not contained in the definition of "mail contractor" in the *CPC Act*. It argues that clear and explicit language is required before individuals are deprived of rights provided by the *Code*.

[24] CUPW also objects to the use of evidence from Parliamentary debates and testimony from former employees of CPC, arguing that neither is admissible to ascertain Parliamentary intent.

[25] CUPW suggests that the Board should give little heed to the argument that the purpose of section 13(5) of the *CPC Act* was to ensure the economic viability and stability of CPC by maintaining the pre-existing tendering process, given that CPC agreed to convert over 6000 rural route contractors to employee status during collective bargaining with CUPW in 2003. CUPW suggests that CPC has continued to be profitable despite creating this exception to section 13(5) of the operation of the *CPC Act*.

[26] CUPW relies on the plain wording of the *CPC Act* for its proposition that only those who have entered into a contract directly with CPC can be found to be a mail contractor. As a result, it argues that the employees of mail contractors cannot be subsumed in this definition and that its applications are not subject to the prohibition contained in section 13(5). CUPW points to the Board's decisions in *Eazy Express Inc.*, *supra*, and *Galarneau*, 2003 CIRB 239, for the proposition that section 13(5) governs the relationship between CPC and mail contractors, but was not intended to extend to the relationship between a mail contractor and the persons that it hires to perform the work. It also points out that the Court, in the decision relied on by CPC, *Canada Post Corp.* v. *C.U.P.W.*, *supra*, did not consider the status of employees of mail contractors.

[27] CUPW argues that, to the extent that the provisions of the *CPC Act* take away rights under the *Code*, those provisions should be narrowly and strictly construed (citing *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3; [2004] 1 S.C.R. 60 and *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008) at p. 467). It suggests that, had Parliament wanted the employees of mail contractors to be included in the definition of "mail contractor", it would have done so expressly. Without this express statutory language, CUPW argues that CPC and Eazy's interpretation of section 13(5) of the *CPC Act* must be rejected. Furthermore, CUPW argues that the fact that Parliament omitted the words "an employee of a mail contractor" from the definition of mail contractor in the *CPC Act*, when those words had appeared in the *Post Office Act*, must be presumed to have some significance.

[28] CUPW argues that section 13(5) of the *CPC Act* does not act as a bar to its applications under section 35 of the *Code*, and that the Board therefore has the necessary authority to hear and determine its single employer applications.

III–Analysis and Decision

[29] The Board has considered CUPW's objection to the admissibility of the records of Parliamentary debates as evidence of Parliament's intent, but is of the opinion that such evidence, while not determinative, is of assistance and admissible. With respect to CUPW's objection to the admissibility of the evidence tendered by CPC's witnesses, the Board notes that, pursuant to section 16(c) of the *Code*, it has the power and discretion to accept such evidence and information as it sees fit, whether admissible in a court of law or not. Accordingly, the Board has considered the evidence of CPC's witnesses.

[30] The evidence provided to the Board reveals that, at the time the *CPC Act* was passed by Parliament in 1981, the mail contractors engaged by CPC and subject to section 13(5) included rural route couriers, CUS contractors and HS contractors. As a result of an agreement reached by the parties during collective bargaining in 2003, the rural route couriers were converted to CPC employees (rural and suburban mail carriers or RSMCs) and were placed in a separate bargaining

unit from the other CPC employees represented by CUPW. However, to this day, CPC continues to tender work to contractors for the movement of mail to and from postal facilities in urban areas (CUS contracts) and the hauling of mail between postal facilities on a regional and national basis (HS contracts).

[31] The evidence before the Board was that the mail contractors who bid for this work take various legal forms: some contracts are held by individuals or sole proprietorships, who perform the work themselves or with the assistance of family members; some are partnerships or small businesses; and some are large transportation companies who also perform work for clients other than CPC. These various mail contractors may or may not have employees or independent subcontractors of their own.

[32] The Board has no doubt that the legislative intent of s.13(5) of the *CPC Act* was, as CPC contends, to ensure that persons performing the work that was historically tendered out to contractors (and particularly the CUS and HS contracts) would never be treated as employees of CPC. The issue for the Board is whether the statute, as drafted, in fact achieves this objective.

[33] The Board notes that the predecessor statute to the *CPC Act*, the *Post Office Act*, did not contain a definition of mail contractor, but did define "postal employee" as:

> "...a person employed in any business of the Canada Post Office, but does not include a mail contractor **or an employee of a mail contractor**;"
>
> (emphasis added)

[34] The *CPC Act* does not contain a definition of "postal employee", but does define a "mail contractor." The definition of "mail contractor" in section 2 of the *CPC Act* does not include the reference to an "employee of a mail contractor" that had been contained in the previous statute. When asked about this omission, CPC witness Mr. Peter McInenly indicated that the drafters thought it was unnecessary and that the language of the definition of "mail contractor" would be sufficient to exempt them from the *Code*. The Board finds it difficult to accept this explanation, and believes it is more likely that Parliament did not intend to exclude the employees of mail contractors from the protections of the *Code*. Had the definition of mail contractor included the additional limitation regarding "an employee of a mail contractor", it would have read as follows:

(5) Notwithstanding any provision of Part I of the Canada Labour Code, for the purposes of the application of that Part to the Corporation and to officers and employees of the Corporation, a mail contractor **or an employee of a mail contractor** is deemed not to be a dependent contractor or an employee within the meaning of those terms in subsection 3(1) of that Act.

(emphasis added)

[35] The effect of adding these words would have been to deprive the employees of mail contractors of the ability to organize under the *Code*, which would be contrary to the objective that both Mr. McInenly and the record of the Committee debates indicate was to ensure that mail contractors such as Air Canada and Canadian National remained subject to the *Code* for the purpose of their relations with their own employees.

[36] In its closing argument, CPC cited the "Golden Rule" of statutory interpretation: that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of Parliament. However, in this case, CPC is asking the Board to interpret section 13(5) of the *CPC Act* so as to prevent not only the entities with which CPC contracts (the mail contractors) from being found to be an employee or dependent contractor for all purposes under the *Code*, but to also prevent a mail contractor from being found to be an employer for some, but not all, purposes of the *Code*. CPC suggests that this extremely large and liberal interpretation of section 13(5) is necessary to give effect to Parliament's intention to maintain a separation between CPC and its mail contractors.

[37] In the Board's view, the wording of section 13(5) of the *CPC Act* cannot be interpreted to extend the limitation on rights under the *Code* contained in that provision to the employees of mail contractors. The provision means exactly what it says, that mail contractors are deemed not to be dependent contractors or employees within the meaning of the *Code*. It does not say that the employees of mail contractors are also deemed not to be dependent contractors or employees, nor does it say that mail contractors are deemed not to be employers.

[38] With respect to their own employees, mail contractors clearly can be employers. Section 13(5) of the *CPC Act* does not operate so as to prevent this result. An application under section 35 of the *Code* requires the Board to determine whether two or more employers are a single employer for the purposes of the *Code*. Accordingly, the Board finds that it has the necessary authority to entertain CUPW's applications.

[39] Accordingly, the hearings on the merits of the union's applications will proceed on May 7-11 and May 24 and 25, 2012, as scheduled.

[40] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Norman Rivard
Member

Patrick Heinke
Member